



Missouri Department of Natural Resources

Clean Water Commission Water Pollution Control Program

Meeting Minutes

July 30, 2003

MISSOURI CLEAN WATER COMMISSION MEETING

July 30, 2003

**Holiday Inn Select Executive Center
Columbia, Missouri**

MINUTES

Present

Thomas A. Herrmann, Chairman, Missouri Clean Water Commission
William A. Easley, Jr., Commissioner, Missouri Clean Water Commission
Janice Schnake Greene, Commissioner, Missouri Clean Water Commission
Paul E. Hauser, Commissioner, Missouri Clean Water Commission
Cosette D. Kelly, Commissioner, Missouri Clean Water Commission
Kristin M. Perry, Commissioner, Missouri Clean Water Commission

Greg Anderson, Department of Natural Resources, Jefferson City, Missouri
Kacee Anderson, City of Reeds Spring, Reeds Spring, Missouri
Stacia Bax, Department of Natural Resources, Jefferson City, Missouri
Dorris Bender, City of Independence, Independence, Missouri
Sheri Bilderback, HBA of Greater St. Louis, St. Louis, Missouri
Bryan Brody, Missouri Coalition for the Environment, St. Louis, Missouri
Robert Brundage, Mo-Ag, PSF, Princeton, Missouri
William Bryan, Assistant Attorney General, Jefferson City, Missouri
Mary Clark, Department of Natural Resources, Jefferson City, Missouri
Ann Crawford, Department of Natural Resources, Jefferson City, Missouri
Irene Crawford, Department of Natural Resources, Macon, Missouri
David Dillon, Department of Agriculture, Jefferson City, Missouri
Cindy DiStefano, Department of Conservation, Columbia, Missouri
Mohsen Dkhili, Department of Natural Resources, Jefferson City, Missouri
Joseph Dom, Department of Natural Resources, Jefferson City, Missouri
Steve Donatiello, Laclede Gas Company, St. Louis, Missouri
Scott Dye, Columbia, Missouri
Brent Farris, Department of Natural Resources, Macon, Missouri
John Ford, Department of Natural Resources, Jefferson City, Missouri
John Griffith, Missouri Coalition for the Environment, St. Louis, Missouri
Todd Harts, University of Missouri, Columbia, Missouri
Ted Heisel, Missouri Coalition for the Environment, St. Louis, Missouri
Jason Heldenbrand, Jefferson City, Missouri
Jim Hull, Director of Staff, Missouri Clean Water Commission
Steve Jeffery, RCGA, St. Louis, Missouri
Ray Jones, Reeds Spring, Lampe, Missouri
Duane Kelly, Independence, Missouri
Carla Klein, Sierra Club, Columbia, Missouri
Richard Kottemann, Jr., Laclede Gas Company, St. Louis, Missouri
Bill Kurtz, University of Missouri, Columbia, Missouri
Dan Lade, Reeds Spring, Reeds Spring, Missouri

John Lodderhose, Metropolitan St. Louis Sewer District, St. Louis, Missouri
Jim Lunan, Holcim (US), Inc., Bloomsdale, Missouri
Ken Midkiff, Sierra Club, Columbia, Missouri
Roger Miller, Layne Christensen, Kansas City, Missouri
Kevin Mohammadi, Department of Natural Resources, Jefferson City, Missouri
Deborah Neff, Assistant Attorney General, Jefferson City, Missouri
Leland Neher, Department of Natural Resources, Jefferson City, Missouri
Charlotte Overby, Missouri River Relief, Columbia, Missouri
Anna Paschke, Missouri Coalition for the Environment, St. Louis, Missouri
Caitlyn Peel, Home Builders Association of Greater St. Louis, St. Louis, Missouri
Kevin Perry, REGFORM, Jefferson City, Missouri
Keith Phipps, Department of Natural Resources, Macon, Missouri
Chris Pieper, Attorney General's Office, Columbia, Missouri
Norb Plassmeyer, Associated Industries of Missouri, Jefferson City, Missouri
John Pozzo, Ameren, St. Louis, Missouri
Charles Raab, City of Kansas City, Kansas City, Missouri
Kris Ricketts, Department of Natural Resources, Jefferson City, Missouri
Ted Salveter, City Utilities, Springfield, Missouri
Randy Sarver, Department of Natural Resources, Jefferson City, Missouri
Phil Schroeder, Department of Natural Resources, Jefferson City, Missouri
Becky Shannon, Department of Natural Resources, Jefferson City, Missouri
Mike Sieczkowski, Regenesys, Lenexa, Kansas
Buffy Skinner, Metropolitan St. Louis Sewer District, St. Louis, Missouri
Terry Spence, Unionville, Missouri
Trent Stover, MEC Water Resources, Inc., Columbia, Missouri
Scott Totten, Department of Natural Resources, Jefferson City, Missouri
Steve Townley, EI ERA, Jefferson City, Missouri
Diane Waidelich, Secretary, Missouri Clean Water Commission

Chairman Herrmann called the meeting to order at approximately 9:10 a.m. and introduced Commissioners Greene, Perry, Kelly, Easley and Hauser; Diane Waidelich, Secretary; Deborah Neff, Assistant Attorney General; and Director of Staff Jim Hull. Vice-Chairman Minton was absent.

Administrative Matters

Public Hearing on Proposed Amendment to 10 CSR 20-6.010 Construction and Operating Permits

All witnesses were sworn in by the court reporter to testify at a public hearing held on a Proposed Amendment to 10 CSR 20-6.010. A transcript of this hearing will be available for review at the office of the Missouri Clean Water Commission, Jefferson State Office Building, 205 Jefferson Street, Jefferson City, Missouri.

Adoption of June 18, 2003 Commission Meeting Minutes

Commissioner Easley moved to **approve the June 18, 2003 meeting minutes as submitted** by staff; seconded by Commissioner Greene and unanimously passed.

Election of Clean Water Commission Officers

Mr. Hull explained section 644.021 of the Missouri Clean Water Law requires election of a Chairman and Vice-Chairman at yearly intervals.

Commissioner Perry **nominated Chairman Herrmann to continue as Chairman** of the Clean Water Commission; seconded by Commissioner Easley and approved by acclamation.

Commissioner Perry **nominated Vice-Chairman Minton to continue as Vice-Chairman** of the Clean Water Commission; seconded by Commissioner Greene and approved by acclamation.

Disaster Relief – City of Stockton

Executive Order 3-14 issued in May by Governor Holden allowed the Department of Natural Resources to provide a waiver or to suspend any state statute, rule or regulation to help communities affected by the tornado. Ann Crawford, Acting Chief of the Water Pollution Control Program Financial Services Section, reported staff has been working with EIERA and the City of Stockton who still owes \$695, 000 on its loan. Staff will be able to waive the administration fee of \$3,673. A meeting is scheduled with the city on August 13 to discuss other options. Ms. Crawford reported the community might be interested in upgrading their facility for ammonia.

Commissioner Perry asked if any other communities were affected by the tornado.

Ms. Crawford replied no other community was participating in a loan pool.

Commissioner Perry commended staff for working with the community.

Enforcement Referrals

Barnett Manor

Kevin Mohammadi, Chief of the Water Pollution Control Program Enforcement Section, reported Barnett Manor is a 16-unit apartment complex located in Barnett, Morgan County, owned by MECO Management. The wastewater treatment facility serving Barnett Manor is a central septic tank and rock filter bed. The receiving stream for the treated wastewater is an

unnamed tributary to Wilkes Creek. The department has inspected this facility at least six times since February 2000 and numerous deficiencies have been noted at each inspection. Mr. Mohammadi stated staff has reached tentative agreement with the owner and recommended referring the matter contingent upon no final settlement agreement being signed by September 1, 2003.

No one was present representing Barnett Manor.

Commissioner Perry moved to **refer Barnett Manor to the Office of Attorney General for appropriate legal action contingent upon settlement not being reached by September 1, 2003**; seconded by Commissioner Hauser and unanimously passed.

City of Reeds Spring

Mr. Mohammadi reported the City of Reeds Spring applied for a State Revolving Loan in November 1993. The application was later changed to a 40 percent grant. In 1994 the city submitted a Facility Plan to the department which specifically listed Rainbow Hills Subdivision, a development of 150 single-family homes, as an area the city intended to provide with sewer service. The facility plan submitted to the department used the development and future growth predictions to calculate the necessary plant capacity to meet the needs of the city, new developments and future growth. On April 15, 1997, the department awarded the city a 40 percent grant based on the cost estimates outlined in the Facility Plan.

Mr. Mohammadi continued that the subdivision submitted an application for a construction permit to construct a wastewater treatment system to serve the subdivision in 1993. During the public notice of the construction permit the City of Reeds Spring filed objections with the department. The city argued that they would have capacity to accept the load from the subdivision and intended to build an interceptor to the subdivision. The department denied the subdivision's application for a construction permit and required the subdivision to install temporary holding tanks until the city has the capacity to treat the load. Due to the length of time involved with applying for and receiving loans and grants the subdivision then entered into negotiations to connect their collection system to the City of Branson West in 1994. During the public comment period for the construction permit the City of Reeds Spring filed objections with the department and indicated that it intended to serve the subdivision when its new wastewater treatment plant is completed.

The city completed construction of the new wastewater treatment facility and the interceptor line on June 9, 1998. Since completion, staff from the department coordinated meetings between the city and the subdivision in an effort to facilitate an agreement by which the subdivision would be allowed to connect to the city's collection and treatment system. Mr. Mohammadi stated negotiations between the parties have not produced an agreement between the city and the subdivision, which would allow the connection.

Mr. Mohammadi reported that on November 8, 2002, the city filed for protection under Chapter 9 in the United States Bankruptcy Court for the Western District of Missouri, Southern Division. According to the city's petition filed on November 8, 2002, by 1998 the city's finances had been stretched tight and their financial records were in disarray. The city then made some personnel changes and began to put their financial matters in order. On July 10, 1998, a pedestrian was injured while crossing a city street and filed a lawsuit against the city. The city was subsequently ordered to pay \$100,000.00 to the injured pedestrian. On September 26, 2002, the city filed an appeal in the Missouri Court of Appeals, Southern District, and the appeal was denied. The city's bankruptcy petition disputes the department's claim that they must reserve capacity for future development of the subdivision for the next 10 years, and further discloses that they do not intend to reserve capacity for the subdivision nor do they intend to refund any portion of the grant money.

The city submitted a Facility Plan to the department that specifically states they intended to provide wastewater treatment to the subdivision and this plan included numbers for this subdivision in the calculations for capacity and for the cost estimate to build a new wastewater treatment facility. By recommendation from department staff, the Clean Water Commission approved a grant based on the city's cost estimates. Since the completion of the facility and the interceptor in 1998, the city has not allowed connection of the subdivision, and has recently disclosed that they do not intend to reserve capacity for the subdivision.

Mr. Mohammadi recommended referral of this matter to the Attorney General's Office for appropriate legal action to compel the city to provide wastewater treatment to the subdivision or to repay that portion of the grant that was attributable to the subdivision due to the city's failure to reserve capacity for the subdivision or repay that portion of the grant attributable to the subdivision.

Commissioner Easley asked for specifics on the grant and what amount staff is requesting to be refunded.

Steve Townley, former Chief of the Water Pollution Control Program Financial Services Section, reported the original grant to Reeds Spring was for \$635,756. The department has asked for repayment of 22.5 percent of that grant or \$143,000 which is attributable to the development's capacity of their new treatment plant.

Commissioner Perry asked where the subdivision is currently connected.

Mr. Townley responded the holding tanks are still being used.

Responding to Chairman Herrmann's question, Mr. Townley stated there are less than a dozen homes constructed in the development.

Commissioner Easley asked if connecting to Branson West is no longer an option for the subdivision.

Mr. Townley responded it is probably not financially feasible since the community's lines are within a short distance of the development.

Dan Lade, Mayor of Reeds Spring, reported the city is five feet from the Rainbow Hills Subdivision and is available if the subdivision honors the USDA and city ordinances to annex into the city which was agreed to.

Commissioner Easley asked if they must be within the city limits before they can be connected and if they objected to being annexed.

Mayor Lade replied they do and the city has been trying to get them annexed for several years. He continued that the subdivision requested 67,000 gallons while they need about half that for sewers.

Commissioner Easley asked if there is other property in addition to this subdivision that could be developed and hooked into the city's system.

Mayor Lade responded Barrington Oaks complied with all regulations of the USDA and ordinances to hook into the city sewer system and has been annexed.

Commissioner Perry asked if Mayor Lade had any objections to the matter being referred to the Attorney General's Office.

Mayor Lade responded whatever it takes to get the issue resolved.

Commissioner Perry asked if there is any legal action against Rainbow Hills Subdivision.

Mr. Mohammadi replied annexation of Rainbow Hills to the City of Reeds Spring was not part of the grant agreement. He continued that if the City of Reeds Spring cannot connect the subdivision, then they should return the grant.

Commissioner Perry noted there is another development that possibly wasn't anticipated at the time that is taking Rainbow Hills' capacity.

Mayor Lade responded there is sufficient capacity to handle both developments.

Ray Jones, Community & Economic Development Director for Stone County, informed the commission that the city's attorney had a meeting conflict and could not attend today's meeting. Rainbow Hills Subdivision was on a list of likely users including existing, imminent and near term development that suggested the sizing of the plant. There was acknowledgement of the slightly longer term likelihood of additional growth in this rapidly growing area. As a result, the sewer plant was designed to be doubled in capacity at a later time. Mr. Jones noted the city attorney's position is that capacity was not specifically earmarked for Rainbow Hills over anyone else but they were included as a likely user.

Owners of the Rainbow Hills Subdivision had initially agreed to annex into the City of Reeds Spring but the owners have wavered numerous times since then. Mr. Jones stated the city would be delighted to connect the Rainbow Hills Subdivision as soon as the owners are willing to follow the city's ordinances and the Rural Development policies and related contracts and agree to annex into the city.

Mr. Jones reported the attorney that filed the bankruptcy papers did so without the approval of the city attorney or the Board of Aldermen and has been fired. He stated Rainbow Hills was platted in 1993 and does not comply with the city's subdivision regulations which were instituted in 1997 and also does not comply with Stone County planning and zoning regulations instituted in 1995. Rainbow Hills is grandfathered in as a result. Mr. Jones stated to reserve capacity for a development that may be unable to compete in the market place due to being substandard will cause economic damage to the city and county. He explained the city attorney believes reserving capacity for a private developer who is unwilling to become a part of the city with the citizens being held liable constitutes a mandate to violate city ordinances, to ignore the policies of a federal agency, and to breach related contracts thereof, and conflicts with state statutes in addition to creating constitutional questions. This also denies the city adequate control over the development and places an unfair burden on the citizens of Reeds Spring because they are liable.

Mr. Jones noted there is an indication that Rainbow Hills has had discussions with an adjacent mobile home park outside the city with a water and sewer system the Department of Natural Resources has indicated they would prefer be connected to a central collection system. He continued to reserve capacity for Rainbow Hills who is unwilling to become part of the city so that the private developer can sell portions of their capacity to other third parties outside the city is highly questionable and suspect and places an unfair burden on Reeds Spring to benefit a private developer. Mr. Jones stated the city believes repayment of the grant is unnecessary because they are willing to connect the Rainbow Hills Subdivision as soon as they annex into the city just as they have connected other parties who have annexed.

Commissioner Hauser referenced the statement regarding providing service without the subdivision being annexed into the city and the liability and asked if the sewer service generates additional revenue to help fund city services or if the reverse is true.

Kacee Anderson, City of Reeds Spring, responded that if the sewer lines do not comply with city standards the city loses control. If the mobile home park gets service from Rainbow Hills Subdivision, the city will lose control of the sewer lines.

Commissioner Perry asked Ms. Anderson her position on referring the city to the Attorney General's Office.

Mr. Jones responded the city would like to see DNR respect the policies of the financing partners because all parties played a part in making this project affordable. Rural Development states that anyone receiving benefits from the sewer plant needs to be in the city. Mr. Jones stated even though DNR is neutral on this issue, the city thinks it's odd that DNR does not have greater respect for city ordinances and rural development policies. He provided a map and described the entities that have annexed into the city in order to connect to the sewer system.

Chairman Herrmann asked if a centralized sewer system has been accomplished.

Mr. Jones stated the schools, businesses, and the developer of Barrington Oaks all wanted access to the sewer and were factored in and annexed to the city in order to be able to connect to the sewer system.

Ms. Anderson stated the city has always stated they would be glad to hook up Rainbow Hills. She explained she is concerned about water drainage from Rainbow Hills since Reeds Spring is below the development. The city requested that the water drainage be fixed but the subdivision did not want to do this. The city then asked them to fix the sewer lines which was done to a certain point but not completed. Ms. Anderson noted she has read the grant and cannot find Rainbow Hills mentioned. The grant states the grantee agrees to enact the state approved sewer use ordinance and user charge system prior to placing the wastewater facilities funded by this grant in operation. Rural Development has required Reeds Spring not to connect Rainbow Hills unless they are inside the city limits because they are protecting the residents of Reeds Spring. Ms. Anderson noted Reeds Spring has tried to protect its citizens by proceeding with annexing Rainbow Hills. If the subdivision is connected to sewers without annexing to the city, the city will be facing lawsuits. Ms. Anderson asked the commission to reconsider referring this matter to the Attorney General's Office.

Responding to Commissioner Perry's question, Ms. Anderson stated she has concerns about a referral of this matter opening the city up to lawsuits.

Mr. Jones stated the desirable outcome would be that the matter not be referred but rather that Rainbow Hills annex to Reeds Spring at which time they will be connected to the sewer system.

Chairman Herrmann asked if it is possible for an incorporated entity to negotiate bulk rates for dischargers outside the city.

Ms. Neff noted it is.

Mr. Townley noted the review of the application was centered on the integrity of the existing collection system and not that of the treatment plant and its capacity. With the application's reference to the Rainbow Hills Subdivision, there was a need for additional capacity and expansion of this treatment facility. Of the 67,000 gallons, 40,500 gallons is for the proposed

platted 150 homes in accordance with the commission's design guide. This is also the foundation for the calculation for the return of the \$143,000 of grant money. The difference in gallons is due to a request from the regional office for some commercial interests. Mr. Townley stated the city offered, as part of negotiations, that Rainbow Hills have 10 years to connect to the system. He continued during conversations with Bruce Hively of the Rural Development authority he indicated that any sewer area being annexed into the city is a policy of Rural Development but he would not make it a requirement in this situation. Mr. Townley explained the city has an opportunity to do an unfriendly annexation in these types of situations which has not been done. He stated staff advised the Missouri Water and Wastewater Review Committee of the deliberations to resolve this situation well over a year ago. The committee did not have any objections to the agency proceeding with the efforts to resolve the situation, which included the possibility of referral.

Mr. Townley noted the grant and its failure to include any reference to the Rainbow Hills Subdivision was discussed. Grants are only awarded after plans and specifications are approved. Mr. Townley concluded that the Rainbow Hills Subdivision was a portion of this project from start to finish.

Commissioner Perry asked how often staff has requested repayment of a grant and how common it is to include in a grant to a city parts that are not already annexed into the city.

Mr. Townley responded requesting repayment is not that uncommon as ineligible activities are found toward the end of a project or as change orders are completed. Requesting repayment because a certain activity was not performed is rather rare. Mr. Townley noted negotiations with the city have continued for more than five years with no successful conclusion, which is even more abnormal.

Commissioner Perry noted her concern is that the state is contracting with the city for a service they will provide to someone over which they don't have control; there is a third party involved who will not be bound by the enforcement action.

Mr. Townley replied it is not uncommon for grants and loans to be awarded to communities to serve residents outside the incorporated area of the community itself. It is done very commonly by contract between the parties and afforded in state statutes.

Chairman Herrmann noted billing rates are negotiated for those outside of the incorporated area.

Mr. Townley stated the statutes provide that a community providing service outside its incorporated area can adjust their ordinances to accommodate for those extra costs. Residents of the community have provided capacity in the facilities that have been constructed over the years whereas residents outside the area have not.

Chairman Herrmann stated the billing rates are based on whatever is negotiated as a payment rate for service.

Ms. Neff reported the Department of Natural Resources has been trying to resolve this issue since 1998, shortly after the construction of the lines and the upgrade to the new plant were completed. She continued that the department anticipated that annexation would occur but that it was not required. It is common to have a contract if a city wants to provide sewer service to someone outside the city limits and not annex them. Annexation was tried in 1995 but shortly before that occurred ordinances were changed that had additional requirements on any developer. These ordinances were thrown out due to a problem with the Sunshine Law.

The Department of Natural Resources met with the Attorney General's Office in 2002 and requested assistance in getting this matter resolved. Annexation has been discussed but the focus has been on a contract. Ms. Neff stated a contract to resolve the situation was worked on in November 2002 but fell through. The department did an extensive review of the contract and of the present condition of the Rainbow Hills collection system and all three parties agreed upon what needed to be done. The department believes these items were done and understood connection was to then occur.

Ms. Neff stated she has spoken with Bruce Hively of Rural Development. If there is a contract that addresses the ability to turn off water for nonpayment and the ability to charge for sewer service, then Rural Development does not object to not having annexation. Ms. Neff noted a contract has never been agreed to. The city's attorney requested the department reconsider the gallons and the department agreed it should be reduced to around 54,000 gallons. This is an engineering decision based on two construction applications filed with the Southwest Regional Office. The minimum number needs to be 40,500 because that is specifically what the department paid for through the grant. Ms. Neff stated she is delighted to hear the city wants to provide service and annexation or a contract would be avenues to consider but that hearing these things and getting sewer service provided are two different things. If annexation fails, involuntary annexation is another route available. Ms. Neff recommended the commission refer the matter simply because the matter needs to go to the next step in order to get resolution. She continued that this is a difficult matter and both sides have legitimate issues. The state paid for a service that has not been provided and the city is obligated to provide the service either through a contract, an annexation agreement, or through involuntary annexation.

Mr. Jones noted other entities besides Rainbow Hills were factored into the calculation and this is reflected in the Facility Plan. These entities have subsequently annexed into the city.

Commissioner Perry asked if these other entities were considered in the 40,500 gallons.

Ms. Neff responded their capacity is totally separate from the numbers being discussed. Those numbers were the amount just for the Rainbow Hills subdivision. The capacity that Reeds Spring got from this upgrade was quite significant.

Mr. Jones stated there was a conditional permit and many of those conditions have not yet been met. A videotape indicates some of the problems beneath the surface. Mr. Jones stated he does not believe Reeds Spring ever agreed to a ten-year reservation of capacity. There appears to be one option proffered by DNR and that is for the city to let Rainbow Hills on the sewer system. Mr. Jones noted this takes away the motivation on the part of the developer to want to do their part. It was the intent to annex from the beginning and all the other parties have annexed into the city. There have been attempts to construct contracts that would possibly take care of the city's needs for adequate control without requiring annexation. Mr. Jones noted Rainbow Hills would like to have very little control placed on them and the city is asking that they join the city just as the other entities have. He stated he has seen very little good faith from the developer.

Commissioner Greene moved **to refer the City of Reeds Spring to the Office of the Attorney General** for appropriate legal action; seconded by Commissioner Kelly and passed with the following vote: Commissioner Perry: Yes; Commissioner Easley: No; Commissioner Greene: Yes; Commissioner Hauser: Yes; Commissioner Kelly: Yes; Chairman Herrmann: Yes

303(d) List Comments

Ms. Shannon reported the commission was provided information by mail on this agenda item in addition to what was provided in their briefing packets since it was too voluminous to include in the packets. EPA disapproved a portion of the 2002 303(d) List requiring that this disapproved portion be put on public notice. Ms. Shannon stated the public notice period has been extended at the request of the commission. Comments in response to this public notice were prepared by members of the commission, the Water Pollution Control Program, and staff of the Environmental Services Program.

Ms. Shannon reported that EPA can only consider comments on the disapproved portions of the proposed 303(d) List. She continued that staff did include comments on some of the other issues associated with the 303(d) List because they felt the comments needed to go on the record and described the information.

Chairman Herrmann stated it was the intent of the commission to accept comments presented by staff and staff would accept comments made by the commission. These comments would be wrapped into a single submission from staff and the commission to EPA.

Ms. Shannon stated the separation of enclosures is not meant to distinguish between the two.

Chairman Herrmann noted he recognizes that but he doesn't think that was the intent of the commission and the commission would be better served by a single, coordinated response to EPA's list.

Commissioner Greene stated that is not what she understood and what is important is that they do not contradict each other.

Commissioner Perry stated she thinks there is a real problem with the department seeing that there is some sort of schism between the commission and the department and she does not like presenting that publicly. She noted statutory sections quoted in the letter to EPA state that this submission and responses come from this commission. Commissioner Perry continued that a member of EPA stated to her that EPA does not want to get involved in any fights between the commission and the department and she does not want there to be any fights between the commission and the department. She noted it's very dangerous to start providing different submissions.

Ms. Shannon stated it was done simply as a matter of convenience. The comments prepared by everybody are appropriate to submit from the staff's perspective.

Chairman Herrmann noted the technical completeness of the responses is very much appreciated by the commission. In sending a single letter the commission is saying they agree with what the staff did. Chairman Herrmann noted comment number 5 regarding deletion by EPA of Attachment B waters in which they said the Consent Decree said they had to consider listing these bodies was deleted. The Consent Decree had two options being list them or prove that they shouldn't be listed. Chairman Herrmann stated he does not believe EPA's basis for inclusion of those 26 waters is valid and correct and asked staff to look at that.

John Ford, Water Pollution Control Program Planning Section, noted any comments the commission has can be relayed to staff through the secretary. Mr. Ford's summary of comments follows.

**COMMENT 1: Additions by EPA to Missouri's 2002 303(d) List
Bear Creek and Willow Branch**

Waters have no designated uses and therefore should not appear on the 303(d) List unless they are specifically allowed by the commission which was done on a previous occasion.

COMMENT 2: Waters Inappropriately Identified as Delisted

Five streams that should be delisted because there was no discrete pollutant mentioned.

COMMENT 3: Cameron Reservoirs 1 and 2

Were not delisted by EPA even though staff requested it because there was inadequate data. Staff is asking reconsideration and has supplied additional information about atrazine degradation and fate in the environment.

COMMENT 4: Change from Habitat Loss to Sediment

Staff believes the level of documentation of the problem is appropriate for the 305(b) report but not for the 303(d) list.

COMMENT 5: 26 Waterbodies

The general comment and other later comments questioned the level of documentation that EPA provides and their use of level 1 data which is used only in very rare cases as noted in the Methodology Document.

COMMENTS 6 – 9:

Comments about individual streams and how EPA chose to use data that staff think is inappropriate for those streams: Hickory Creek in Grundy County, Sandy Creek in Putnam County and West Fork Locust Creek, and Willow Branch. Willow Branch was also covered under Comment 1.

COMMENT 10: Unknown or undefined pollutants and therefore should be removed from the list simply because you cannot do a TMDL on a waterbody with an undefined or unknown pollutant.

COMMENT 11: Wording that EPA used in its proposed list that seemed to indicate that the department's analysis of boundary water conditions in its listing was incomplete. In later discussions EPA agreed that it was complete and accurate. Staff has asked that this wording be removed.

COMMENT 1: Use of dissolved oxygen data and interpretation of dissolved oxygen standards.

EPA seems to be ignoring present dissolved oxygen standards in some of their listing decisions and are using some standard of which staff is not aware. Staff believes until EPA and the states can agree on a new dissolved oxygen standard, the existing state standard should be relied upon.

COMMENT 2: Determination of what Constitutes Adequate Proof

More of a detailed discussion of Chairman Herrmann's comments. Staff believes EPA's use of level 1 data is generally inappropriate and often level 1 data itself really does not indicate a problem.

COMMENT 3: Possible Errors Related to Data Analysis or Interpretation of Data

EPA made some errors in their reading of data that are being pointed out.

Comment 4: EPA wanted to use the word sediment. Sediment has two very different components, a volatile one which is basically organic material that comes from a wastewater plant and nonvolatile which is mineral solids. EPA was asking both of these be listed even though evidence showed that only one was a problem. Changing this prevents unnecessary work in TMDLs addressing two different sediment fractions only one of which is probably a problem in most of these waters.

COMMENT 5: Changing what staff had listed as “Habitat Loss” back to “Sediment” Staff considers this a very serious difference of opinion. Sediment being a discrete pollutant would force staff to do TMDLs. Staff feels that habitat loss is a much more accurate term and requiring the state now to do sediment TMDLs in the next few years will only get at part of the problem. On certain streams where they may be required, sediment may not be part of the problem at all. A lot more needs to be known. The new guidance would provide ample opportunity to put this in the appropriate category, which is not category 5 where a TMDL is required, but category 2 or 3 where there is inadequate data and further study is needed. The opportunity for removing those from the list which were listed in error or with inadequate data was noted in the new guidance. For the next list, staff will try to get some of them removed from the list or the name of the pollutant changed back to habitat loss.

Chairman Herrmann asked for more information about the new guidance.

Mr. Ford replied it has just come out for comment. The guidance has the same five categories that were previously proposed. It’s a real advantage for staff since it allows placement in a different category of waters that staff was uncomfortable making a decision on one way or the other.

Chairman Herrmann asked if there is a prediction on getting this guidance approved.

Mr. Ford responded there seems to be a lot of inertia somewhere to getting any sort of new guidance adopted.

COMMENT 6: Boundary Waters regarded EPA’s concern about staff’s effort.

COMMENT 7: Listing of the Missouri and Mississippi Rivers for Chlordane and PCB Staff had originally objected to this based upon the fact that the advisory was only for sturgeon. Staff assumed the amount of sturgeon that was actually used were insignificant. Staff contacted the Department of Conservation and found out that due to the collapse of the caviar fishery in the Caspian Sea, those people are now looking for new markets and new sources of sturgeon eggs. The last several years the fishing pressure on sturgeon in the Missouri and Mississippi Rivers has increased significantly. Staff has agreed that this does represent a loss of a beneficial use and are agreeing that this is an appropriate listing.

COMMENT 8: DNR Listings Not Addressed by EPA Draft 303(d) List

There were five waters which staff had listed in some manner or requested delisting on that did not appear on EPA’s list. Staff has asked for clarification of their proposed status of those waters. When the list came out it included some new information that supported the delisting of five additional waters. EPA has not acted upon that and have told staff they are acting only upon the original list and not accepting new information.

COMMENT 9: Suggested Delistings Based on Recent Quantitative Macroinvertebrate Monitoring

DNR's Environmental Services Program has for years done a significant amount of quantitative monitoring of invertebrate communities in wadable streams. Much of this data was looked at to see where that data indicated that reference conditions or the best aquatic habitat conditions that could be expected existed in Northern and Western Missouri and compared that to streams that were on the 303(d) List.

Scott Dye, Putnam County, stated his comments regard the commission's proposed delisting of Willow Branch from the 303(d) List. There are two Premium Standard Farms (PSF) lakes at the top end of the Willow Branch watershed built in 1994 and 1995 which cut off 50 percent of the watershed running through the Dye property. Mr. Dye reported his family fought the Corps of Engineers for five years before water was put back into the stream running through the farm and continue to battle over this. An after-the-fact permit was issued to PSF to discharge water back into the stream. The Corps requires aquatic maintenance flow to keep the macroinvertebrate and fisheries alive in that stream and a channel maintenance flow every two years which is a large flow over a 24-hour period. Mr. Dye stated the most recent correspondence from the Corps is a July 1, 2003 Notice of Noncompliance to PSF because they have not done the aquatic channel maintenance flow that they were required to do in this year.

Mr. Dye reported he has been a member of the Missouri water quality monitoring program for volunteers since 1994, is a level 3 volunteer and has monitored on this stream for eight years. He continued he has seen some of the worst algae blooms seen in the stream since he began monitoring it in the last year. Mr. Dye stated the commission proposes to delist the stream because it has no beneficial uses. He noted the stream is used for livestock watering and recreation, three cedar tree revetments have been installed to improve the quality of the stream, two stone box culverts have been installed so stream crossing does not cause damage to the stream bed, and numerous game plots and other vegetation have been installed along the stream to improve the wildlife habitat.

Mr. Dye stated he has asked DNR repeatedly to list the stream and requested the commission to direct staff to give the stream a waterbody ID . He noted his family has invested tremendously in the stream and the commission's action is not helpful to improving or promoting or preserving clean water.

Chairman Herrmann stated Water Quality Standards revisions are upcoming and Mr. Dye's request can be included with those revisions.

Commissioner Greene referred to comment 9 and asked if level 2 data is not used.

Mr. Ford noted that should read level 1 data. All volunteer data along with a lot of the data DNR collects is level 1 data for quality.

Commissioner Greene asked if this is even for a person who has gone through level 3 which goes through QA/QC.

Mr. Ford responded it is the amount of data that is collected and the type of data.

Ms. Shannon stated under the MOU with EPA regarding TMDLs the department is required and is moving forward with development of a level 4 quality assured volunteer monitor. This is being done on a pilot basis with Scott Dye being among the first. Staff anticipates that the level 4 data will be quality assured to a degree that staff will be able to use it in matters where the level 3 data is not now used.

Commissioner Greene asked why even though you have to go through QA/QC to get level 3 data it is still not good enough.

Ms. Shannon responded it is very good data but the way it's defined in the Methodology Document, the level 3 volunteer monitoring data is not level 1.

Mr. Hull reiterated Chairman Herrmann's comment and noted it is the department's desire to have a unified response.

Chairman Herrmann stated the commission accepts and appreciates all the data that staff has put together and the transmittal letter should be signed by the chairman and staff director for a coordinated approach.

Ms. Shannon asked if taking out the headings and making enclosures 1 & 2 into one document and including the remainder as appendices would obtain this goal.

Chairman Herrmann noted some of the comments could be combined where they were redundant.

Commissioner Perry moved to **grant authority to Chairman Herrmann and Director of Staff Hull to transmit a combined response to EPA on the proposed 2002 303(d) List including adding back Comment 5 and changing level 2 to level 1 in comment 9;** seconded by Commissioner Easley and unanimously passed.

Ms. Shannon reported staff is moving forward with the methodology document rulemaking as directed by the commission. Staff is reviewing the draft guidance from EPA to see if there are any conflicts between EPA's guidance and the methodology rule that will be proposed by staff. EPA's draft guidance states that they do not anticipate any regulatory changes or waivers to change the April 2004 due date for the 303(d) List. Ms. Shannon stated staff has made it very clear to EPA that staff's legal constraints in promulgating a rule make it impossible to meet that due date.

FY 03 319 Nonpoint Source Grant Funding Summary

Ms. Shannon introduced Greg Anderson who is the new nonpoint source coordinator joining the Water Pollution Control Program from the Land Reclamation Program. Mr. Anderson will take over much of the 319 grant work and the implementation of the state's nonpoint source management plan.

Ms. Shannon reported during the June commission meeting, staff was asked to move forward with a partial grant request to EPA. Staff has proceeded with this and anticipates submitting the request tomorrow.

Commissioner Perry asked if staff anticipates any difficulty from EPA regarding funding the nine projects that the commission approved.

Ms. Shannon responded there have been no problems in the past and EPA sits on the grant review committee and was involved in the ranking.

Ms. Shannon reported the commission asked that the balance of funds be directed to the best discretionary use as determined by the department and requested a report on the use of those funds. Specific numbers are not available since staff is currently negotiating grants with EPA and working to make sure anything that is proposed will be eligible. Ms. Shannon explained the items that were proposed are not proposals that were submitted during the competitive process and are not activities that would ordinarily be funded with 319 money.

Erosion control and technical assistance

To fund staff in the Outreach and Assistance Center that currently do this activity. This particular project to do this training was previously competed for in a grant process and is coming to a close. Staff believes it is important to continue the work. Staff will negotiate to see if resources are available for this project.

Support for TMDL activities

There is a lot of public involvement with nonpoint source TMDLs. Staff relies on the Outreach and Assistance Center for help with public meetings.

Volunteer Water Quality Monitoring

A request was made at the last meeting to add a staff person to the volunteer water quality monitoring efforts. This activity was competed for years ago in the 319 program and has continued to be funded as a long-term project.

Pesticide-related Activities

This is training for pesticide applicators, providing technical assistance and assisting with some management of waste pesticides to keep them out of the water. The Outreach and Assistance Center has asked for one-quarter of an FTE of funding to do this.

Poultry Litter Exchange

The Outreach and Assistance Center is well into the process of developing this web-based exchange program for those who have and use poultry litter to allow them to connect.

Oklahoma and Arkansas have similar programs and the outreach office is asking for funding to implement and maintain this program. Ms. Shannon noted this project has not competed before but she expects it to be eligible.

Water Quality Education Activities

There are some other water related educational activities conducted in the outreach office that would be considered eligible for 319 funding.

Chairman Herrmann asked if the one-quarter FTE for the poultry litter project is in conjunction with other similar activities.

Ms. Shannon replied this is a computer specialist that will be maintaining the web site.

Ms. Shannon explained three potential additional projects that staff would like to pursue.

Special Watershed Grants

The incremental money staff receives is to be targeted only for 303(d)-listed waters and only for the development and implementation of watershed-based plans. Staff sees a lack of watershed-based plans in the state to allow staff to direct money appropriately in future years. Ms. Shannon explained staff would like to set aside some of the incremental money to do this targeted grant program to encourage development of watershed-based plans on 303(d) listed waters. The conceptual framework has been developed by staff. Ms. Shannon noted she has discussed the idea with EPA and they are comfortable with it but a formal review will need to be done.

Monitoring in the Elk River Watershed

Funding requested from EPA from two different funding sources was declined. Ms. Shannon noted staff would like to target some of the 319 money for this monitoring in an amount less than \$200,000. This would support the development and implementation of the TMDL and the current nonpoint source 319 projects that are underway in the Elk River Watershed.

Development of a TMDL for Little Sac Watershed

319 funding could technically be used to fund the development of a TMDL for the Little Sac Watershed by FAPRI. FAPRI completed a watershed plan on Shoal Creek that staff is submitting to EPA and working on having it adopted as a nonpoint source TMDL. Staff would like to see the same sort of project with 319 money on the Little Sac Watershed.

Commissioner Perry asked if the commission will at some time see total numbers and how they will be divided among the projects.

Ms. Shannon replied that can be done and staff is proceeding to do a partial grant application to get funding to move forward. The partial grant application to EPA includes the nine projects that were approved at the last meeting and staff funding.

Commissioner Easley asked if staff feels pressured to do more in this particular watershed based on the recent settlement between Oklahoma and Arkansas.

Ms. Shannon replied the urgency to do this is no different than it was prior to the settlement. Staff recognizes that this is an area where there is a lot of impaired waters with other states being concerned and staff needs to be especially careful in coordinating. The focus on the Elk River is driven by the fact that there are a lot of impaired waters and a water quality problem that needs to be addressed.

Charlotte Overby, project coordinator for Missouri River Relief, reported her 319 project application was not selected for funding and she thought possibly some of the discretionary funding could be used for this project. She explained that Missouri River Relief specializes in taking trash out of the Missouri River in urban and rural areas. The group has been in existence for three years and operates on about \$100,000 per year. Ms. Overby stated the money was requested to help the group work in smaller communities where the money cannot be raised. She continued that it was not conveyed what a tremendous implementation project this is as well as an educational project. Ms. Overby asked that the commission consider using some of the discretionary funding for Missouri River Relief. She asked that the commission take a broader view of what an implementation project might be.

Commissioner Kelly asked how much money had been requested for the project.

Ms. Overby stated the requested amount was \$180,400.

Commissioner Kelly asked if it would be possible to use some of the discretionary funds for this project.

Ms. Shannon noted she does not yet know how much money is available for the items that are to be funded. The commission may decide that this project is a higher priority than some of the others.

Chairman Herrmann noted the expenditure of money for other projects is still under consideration and staff will recommend to the commission whether or not to include this project.

Closed Session

Commissioner Greene moved to **go into closed session** at approximately 12:15 p.m. to discuss legal, confidential, or privileged matters under section 610.021(1), RSMo; personnel

actions under Section 610.021(3), RSMo; personnel records or applications under Section 610.021(13), RSMo or records under Section 610.021(14), RSMo which are otherwise protected from disclosure by law; seconded by Commissioner Kelly and unanimously passed.

Commissioner Greene moved to **reconvene the open session** of the meeting at approximately 1:30 p.m.; seconded by Commissioner Perry and unanimously passed.

Water Quality Standards Briefing

Ms. Shannon reported EPA did a review of the Water Quality Standards in 2000 and informed the state of revisions that were needed to the Water Quality Standards. The department developed a schedule for the revisions to the standards and held public meetings. Ms. Shannon noted key staff left the program causing a delay in addressing the standards revisions.

Mohsen Dkhili, Chief of the Water Pollution Control Program Modeling Unit, introduced Joe Dom and Stacia Bax who have been working on the Water Quality Standards since joining the program and have done a great job. Following is Mr. Dkhili's presentation.

- I. EPA response to past changes made by clean water commission
- II. MDNR responded with a schedule outlining issues raised by EPA along with a three year phased revision plan
- III. Stakeholder meetings
- IV. Clean Water Commission

40 CFR 131.20 requires that States:

- Review their water quality standards at least once every 3 years.
- Hold a public hearing.
- Submit Review Results to the EPA Regional Administrator.

40 CFR 131.22

- EPA rectifies disapproved WQS if the State fails to do it.
- In Sept. 2000, EPA officially disapproved some revisions made to the WQS in 1994 & 1996.

WQS Development & Review Process

The development process takes about three years with stakeholder advisory committee meetings, and public hearings. The standards are then submitted to EPA within 30 days who has 60 days to approve or 90 days to disapprove. If the state does not adopt the changes specified by EPA within 90 days after notification, EPA will promulgate the changes. EPA may extend the 90 days if they know the state is working on the revisions.

WQS Revisions

- Metals Criteria for Protection of Aquatic Life
- Metals Criteria for Drinking Water Supplies
- Site Specific Criteria
- POTW Permitting in Outstanding National Resource Waters
- *Escherichia coli* (*E. coli*) Indicator Bacteria [rather than fecal coliform as a bacteria indicator]
- Ammonia Criteria
- Bull Creek added as an Outstanding State Resource Water
- Miscellaneous Changes

Metals Criteria for Protection of Aquatic Life

- Addition of *Ceriodaphnia* (Order Cladocera) in species recalculation
- Equation based criteria
- Table representing criteria according to the lowest hardness value in a range
- Increases protection of aquatic life (AQL)
- Metals affected by proposal:
 - Cadmium, Trivalent Chromium, Hexavalent Chromium, Copper, Lead, Nickel, Silver, and Zinc

Metals Criteria for Drinking Water Supplies

- Missouri currently uses dissolved metal criteria
- EPA requested we use total recoverable
- MDNR staff recommends using
- Total recoverable metals for Human health based criteria: Antimony, Arsenic, Barium, Beryllium, Cadmium, Chromium, Copper, Lead, Mercury, Nickel, Selenium, Silver, Thallium, & Zinc
- Dissolved metal for Aesthetic based criteria: Iron & Manganese

Site Specific Criteria

- Dissolved oxygen (DO) criteria = 5 mg/L year-round to protect aquatic life
- Naturally occurring seasonal fluctuations may cause DO levels to drop below 5 mg/L
- EPA guidance allows for site-specific adjustment of criteria based on natural conditions
- A methodology document will outline the site specific criteria derivation methods
 - If natural conditions present at the site are higher or lower than applicable criteria.

POTW Permitting in ONRW

- Allowing new POTWs in ONRW is inconsistent with Federal Antidegradation Policy 40 CFR 131.12(a)(3)
 - exempts certain dischargers from Tier III restrictions.
 - conflicts with the “no lowering of water quality” goals of Tier III in 10 CSR 20-7.031(2)(C).
- No increase in net loading of any pollutant
 - Allowed for only POTWs
 - New facilities or expansions allowed if existing dischargers improve effluent quality
 - Waters currently listed as ONRW: (watershed based)
 - Current River, Jacks Fork River, and Eleven Point River.

Escherichia coli (*E. coli*) Indicator Bacteria

- Fecal Coliform Bacteria = 200 colonies/100 mL
- EPA has strongly encouraged Missouri to adopt EPA’s *Ambient Water Quality Criteria for Bacteria-1986* for primary contact recreation (whole body contact recreation).
 - “Where a state does not amend its water quality standards to include the 1986 criteria, EPA will act under Section 303(c) of the Clean Water Act to promulgate the criteria with the goal of assuring that the 1986 criteria apply in all states not later than 2003.” (EPA/600/R-98/079)
 - *E. coli* Bacteria = 126 colonies/100 ml
 - Three year transition period

Ammonia Criteria

- Currently use EPA’s *Ambient Water Quality Criteria for Ammonia-1984* (EPA 440-5-85-001).
- Updating to EPA’s *1999 Update of Ambient Water Quality Criteria for Ammonia* (EPA 822-R-99-014).

- Table B1. Acute Criteria for Total Ammonia Nitrogen (mg N/L)
- Table B2. Chronic Criteria for Total Ammonia Nitrogen (mg N/L): Limited Warm-Water Fisheries- Early Life Stages absent
- Table B3. Chronic Criteria for Total Ammonia Nitrogen (mg N/L): Cold-Water, Cool-Water, & General Warm-Water Fisheries- Early Life Stages present

Miscellaneous Changes

- During the June 18, 2003 meeting, the Clean Water Commission directed staff to propose Bull Creek Watershed in Taney & Christian counties for Outstanding State Resource Water status
- Bull Creek; 25.5 miles classified (8.0 miles within Mark Twain National Forest in Christian County)
- Corrections and additions to:
 - Table A (Criteria)
 - Table B (Ammonia)
 - Table C (Cold-Water Fisheries)
 - Table E (Outstanding State Resource Waters)
 - Table F (Metro No-Discharge Streams)
 - Table G (Lake Classification and Use Designations)
 - Table H (Stream Classification and Use Designations)
 - Table I (Biocriteria Reference Locations)
 - Table J (Losing Streams)

Chairman Herrmann noted most of the hardness in Missouri's water supplies is calcium and magnesium and is independent of metals concentration in those waters. He asked why there is a tie to hardness and metals.

Mr. Dkhili explained the metal's reaction in the water depends on the hardness which is the amount of either calcium or magnesium carbonates. As hardness goes up that reaction goes down.

Chairman Herrmann noted when you precipitate metals in waters you have to elevate the pH to 10.0 in order to precipitate those metals and he didn't think hardness has a thing to do with metals.

Mr. Dkhili responded the formula being used and recommended by EPA is a fraction of hardness and that gives two parts of the equation where one part is to get the dissolved and the other to get the total. Both parts of the formula have the logarithmic component of hardness. Mr. Dkhili will provide information on this to Chairman Herrmann.

Chairman Herrmann stated he disagrees with the injection of hardness rather than pH as a component to determining it based on treatment of plating wastes.

Mr. Dkhili noted the criteria from these formulas will be lower than what is currently used specifically because of the bigger ranges of hardness being used.

Chairman Herrmann noted whether or not to include Willow Branch should be considered by staff. He continued that clarification of the intent of the phosphorus regulation for Lake Taneycomo and Table Rock Lake are included. Chairman Herrmann noted when the phosphorus language was adopted for Table Rock there was a discussion about when people should have phosphorus limitations. The commission adopted the elimination from consideration of treatment plants in the small treatment category which was 22,500 gpd or less. It is interpreted by staff so that any new facilities coming on line under 22,500 gpd are still applied the same timetable to comply with the phosphorus regulation. At the time this was discussed, the amount of phosphorus predicted to come from the 22,500 gpd and under treatment plants was less than one percent of the total phosphorus discharged to the lake. At that time the commission did not want to affect incidental discharges of phosphorus because the inclusion of phosphorus removal in plants of that size is more than the cost of the plant itself. Chairman Herrmann indicated staff is not implementing the regulation in this manner. He suggested that the intent of the commission, that 22,500 and under should be exempt from the phosphorus removal regulations, be revisited.

Ms. Shannon noted staff will follow up on this. She asked if the commission needed any further information before staff proceeds with the rulemaking.

Chairman Herrmann responded staff should proceed with the rulemaking.

Ms. Shannon reported one of the areas EPA identified as disapproved in the Water Quality Standards related to whole body contact. Staff struggled with how to implement the requirements of EPA which say that all waters are to be fishable or swimmable.

Chairman Herrmann noted where practical, where possible.

Ms. Shannon noted EPA tells staff that the presumption is that the waters are fishable and swimmable and staff has to provide EPA evidence that those uses are not achievable. She continued that the proper indicator organism has to be in place which is E. coli versus fecal coliform. Staff has worked with some of its partners to identify a mechanism for doing some evaluation of waters to identify those where it is not achievable to have whole body contact recreation on these waters and to identify some waters that absolutely have to be designated for whole body contact. This needs to be done in a systematic process rather than including all waters for whole body contact as EPA indicated previously. Ms. Shannon described a draft Memorandum of Understanding that has been discussed with EPA and some partners which was provided for the commission's information and for any comments they may have.

She noted an error in the last full paragraph on page 63 in the briefing packet. "The landowners" should be "the public." The public will have the opportunity to submit comments rather than just landowners. The dates on page 64 are also in error and will be corrected before the Memorandum of Understanding is signed. Ms. Shannon noted EPA has reviewed and edited the Memorandum of Understanding but the parties have not yet finally approved it.

Chairman Herrmann asked if the intent of this partnership is to determine which streams may be eligible for inclusion on a whole body contact list.

Ms. Shannon responded and also to determine which streams where it may be impossible to support whole body contact recreation.

Commissioner Perry mentioned where there is no public access.

Ms. Shannon replied staff will need to work with EPA as far as what they will accept for documentation.

Chairman Herrmann stated the definition of a class C stream is streams that may cease flow in dry periods but maintain permanent pools which support aquatic life and the definition of whole body contact is you may immerse the body in water. If a stream ceases flow but maintains pool so that you may get your feet wet, you can't immerse your body in that. Chairman Herrmann stated he counted around 3,517 classified streams in Table H out of which about 2,485 were class C streams. He suggested a lot of these class C streams are incapable of being classified for whole body contact.

Mr. Hull noted a concern he has with designating all waters as whole body contact and then working to get them out of that designation reminds him of the 303(d) List and what kind of documentation would you have to provide EPA for them to agree the stream was not whole body contact.

Chairman Herrmann responded he thinks getting others involved who have an interest and knowledge in this issue is an intelligent approach to address the problem of identifying those streams which should be designated and those which should not be designated as whole body contact.

Ken Midkiff, Director of the Water Quality Campaign of the National Sierra Club, read from the Water Quality Standards Handbook Second Edition Chapter 2 from the USEPA which states "Even though it may not make sense to encourage use of a stream for swimming because of the flow depth or velocity of the water, the states and the EPA must recognize that swimming and/or wading may occur anyway. In order to protect public health, states must set criteria to reflect recreational uses if it appears that recreation will in fact occur in the stream." Mr. Midkiff narrated the following PowerPoint presentation.

WHOLE BODY CONTACT RECREATION

- Section 101 of the Federal Clean Water Act states (in part):
 - The objective of this Act is to restore the chemical, physical, and biological integrity of the Nation's waters.
 - Section 101(a) continues by elaborating on two "national goals"
 - Eliminating the discharge of pollutants into navigable waters by 1985, and
 - Achieving an interim water quality level that would protect fish, shellfish, and wildlife, while providing for recreation in and on the water wherever attainable.
- Section 101(b) makes it congressional policy to recognize and preserve the states' primary responsibility to meet the above two goals.
 - It is clear from Section 101 of the Clean Water Act that ALL waters of the state are to meet two basic criteria:
 - Support aquatic life (i.e. "fishable")
 - Support water recreation (i.e. "swimmable")
- As best as can be determined, EVERY waterbody in this state has as one of its "beneficial and designated" uses "support aquatic life."
- So that portion of the CWA is being met.
- However, there are approximately 4000+ waterbodies in the state for which Whole Body Contact Recreation is not a "beneficial and designated" use.
- Chapter 40, Part 130, Section 10 of the Code of Federal Regulations (40CFR130.10) establishes how streams may be removed from Whole Body Contact Recreation (sometimes referred to as "primary contact".)

Federal laws and regulations make it clear that ALL waters of the state must be supportive of Whole Body Contact Recreation – unless a Use Attainability Analysis dictates that such is "unattainable".

- But the MOU proposed to set out the procedure for designating WBCR turns the Clean Water Act on its head:
 - The proposal is to conduct Use Attainability Analyses to determine which waterbodies are to be designated WBCR – rather than determining which ones can not.

In the July 7, 2003, issue of the Federal Register, the Environmental Protection Agency has posted a 61-page document that sets Water Quality Standards for Kansas. This was done as the result of litigation by the Kansas Natural Resources Council and the Sierra Club.

- This document contains the following (II,A):
- “EPA’s regulations at 40CFR131.10 describe the process States must follow and the analyses States must conduct PRIOR TO [emphasis added] to designating any uses that do not include the 101(a) goals.”

In September of 2000, EPA Region VII reviewed Missouri’s Water Quality Standards as submitted in the Triennial Review.

- EPA stated (in part):
 - “...water quality standards [must] provide for fishable/swimmable uses unless those uses have been shown to be unattainable, effectively creating a rebuttable presumption of attainability.”
- Note that EPA’s language on attainability is in the “past tense” – the waters are to be designated as “fishable/swimmable” until a UAA proves otherwise.
- The Sept. 2000, EPA review document further states:
 - “Uses are considered by EPA to be attainable...if the uses can be achieved
 - 1) when effluent limitations under Section 301(b)(1)(A) and (B) and Section 306 are imposed on point source dischargers, and
 - 2) when cost effective and reasonable best management practices are imposed upon nonpoint source dischargers (40CFR131.10(d)).”
- The Clean Water Commission conserves the water of the state and protects, maintains, and improves the quality thereof for public water supplies and for domestic, agricultural, industrial, recreation, and other legitimate beneficial uses and for the propagation of wildlife, fish, and aquatic life.
(Ch. 644, RevStatsMo)

Mr. Midkiff noted this is the Missouri River which is not listed as a whole body contact recreation stream but he is sure it will be. He concluded that the letter from EPA informing DNR that the Water Quality Standards and designated beneficial uses do not meet the requirements of the Clean Water Act was sent on September 8, 2000. Along with several other persons, Mr. Midkiff stated he attended a series of working sessions to upgrade Missouri’s Water Quality Standards that occurred in 2001 and were led by John Madras. On April 25, 2003 Mr. Midkiff sent a letter to Chairman Herrmann, Director Mahfood, Deputy Director Totten and Program Director Hull referencing the September 8, 2000 letter from EPA stating that the Sierra Club’s expectations that the next 303(d) List would list those waters that do not meet whole body contact standards. Mr. Midkiff stated he has never received a response to that letter. On July 2, 2003, the Missouri Coalition for the Environment issued a 60-day Notice of Intent to Sue the USEPA for failing to compel the state to comply with the Federal Clean Water Act. On July 7, 2003 the USEPA posted notice

in the *Federal Register* that they were adding 1,056 waterbodies to the Kansas Primary Contact Recreation Designation pursuant to a court order. Mr. Midkiff noted this is significant since Kansas does not have that many surface waters. He stated that the Missouri Clean Water Commission must list all waters of the state for whole body contact recreation until such time as a use attainability analysis shows that this cannot be attained on a specific waterbody. The waterbodies must be designated as whole body contact recreation and water quality standards must be met to support such recreation. A use attainability analysis creates a rebuttable presumption which means it can be challenged so any use attainability analysis must outline a procedure for challenging a finding that a waterbody in question cannot obtain the whole body contact recreation standards. Mr. Midkiff stated it is perplexing that the Clean Water Commission tries to find ways to avoid protecting and restoring our state's most valuable resource. He noted some of the comments made during the 303(d) discussion are very good examples of this. Mr. Midkiff continued that the Sierra Club is interested in cleaning up the state's waters, not in pretending that no problem exists. The Sierra Club is interested in preventing pollution, not protecting polluters.

Chairman Herrmann quoted the definition for whole body contact recreation contained in the commission's regulation: "Activities in which there is direct human contact with the raw surface water to the point of complete body submergence. The raw water may be ingested accidentally and certain sensitive body organs, such as eyes, ears and the nose, will be exposed to the water. Although the water may be ingested accidentally, it is not intended to be used as a potable supply unless acceptable treatment is applied. Water so designated is intended to be used for swimming, water skiing, or skin diving." Chairman Herrmann stated if you can't immerse your body in the sustained pools, then it is not swimmable.

Mr. Midkiff responded children's bodies are not very thick.

Chairman Herrmann responded neither are puddles in most of these Class C streams.

Mr. Midkiff stated just because a stream does not flow perpetually does not mean it does not have pools which are anywhere from one foot to six feet deep. The standard that the commission has laid out is not in compliance with the Federal Clean Water Act which says that all waterbodies must be whole body contact recreation until determined otherwise. Mr. Midkiff stated there is a provision for determining otherwise but waters must first be declared whole body contact and then removed from the list. He stated it is not appropriate to do the use attainability analysis to determine which streams cannot be placed on that list.

Robert Brundage stated he has been an advocate of the Memorandum of Understanding approach that the Departments of Natural Resources and Agriculture and the EPA have been moving toward regarding this issue. The MoAg Industries Council is supportive of this concept and thinks it's the common sense approach. If a lot of streams are put on the list, there will be municipalities located in these watersheds that will have to start disinfecting and spending money and resources on a stream where it is not really necessary.

Chairman Herrmann noted if disinfection is done by chlorination then dechlorination will probably have to be done.

Budget and Legislative Discussion

Scott Totten, Director of the Water Protection and Soil Conservation Division, reported the 2004 budget was signed by the Governor at the end of May. The 2004 budget switched the 401 water quality certification staff from general revenue to federal funds with the loss of the FTEs and the general revenue for that function. An Environmental Specialist IV was lost in the Enforcement Section as a result of Senate action and the Jefferson City Regional Office was closed. Those staff are now working with the other five regional offices with the boundaries being redrawn. The director's position for the Public Drinking Water Program was also lost. Alternative leadership for that program is being evaluated which includes potential consolidation with the Water Pollution Control Program, which is done in several other states. This is being looked at as an option along with consolidating the Public Drinking Water Program with the Soil and Water Conservation Program, and a different organization of the Public Drinking Water Program with fewer sections. All the options are being evaluated with the staff and the Safe Drinking Water Commission. Mr. Totten noted if consolidation with the Water Pollution Control Program is the selected option, this will be brought back to the commission.

Chairman Herrmann noted both water and wastewater were under the Division of Health before reorganization of state government occurred.

Mr. Totten stated one of the options is moving the program back to the Department of Health but that is not believed to be an acceptable option.

The Governor withheld an additional three percent of general revenue from the budget which means there is a six percent withholding which may grow as the year goes on. Randy Clarkson has taken advantage of the early retirement bill. One of the provisions of the early retirement bill is that the department can refill one of four positions that leave the department. There is an exemption in the statute for federally funded positions but the definition is that it has to be 100 percent federally funded for the last 12 months. Payrolls are typically split between different funds so the department may not be able to refill this position and could lose it completely. The idea is to downsize state government, not necessarily save general revenue.

Mr. Totten noted there is no legislation from the water division at this time.

Other

Terry Spence explained that he had asked the commission on April 23 to look into referral of an individual to the professional board due to certification issues.

Chairman Herrmann responded that he understood that Mr. Spence had gone forward with filing a complaint of his own with the Board of Registration for Architects, Professional Engineers and Land Surveyors.

Mr. Spence replied he did follow up with a complaint in the event the commission did not. He stated he thinks this is a very serious issue.

Chairman Herrmann stated he thinks they have a difference of opinion and since Mr. Spence submitted the complaint there was no need of action from the commission.

Mr. Spence noted he would have liked the complaint to have come from the commission since they have done so in the past. He stated he feels it's in the best interest of the state for this to be investigated as soon as possible.

LEGAL MATTERS

Dismissal of Appeal 380 St. John's Bayou and New Madrid Floodway Project

An appeal was filed by the Army Corps of Engineers (COE) after which several parties intervened. The COE and Department of Natural Resources entered into settlement negotiations regarding the certification and came to an agreement after which the COE filed a voluntary dismissal. The intervenors were not a part of the negotiations. The Hearing Officer's order recommended dismissal because she is unaware of any law that would allow a case to go forward after all appellants have dismissed their appeal.

Commissioner Perry asked if that was in response to one of the intervenors wanting to continue the case.

Ms. Neff responded one of the intervenors wanted to continue with the case and argued that the case was still viable and should go forward.

Commissioner Perry asked if there is an action that may be appealed if the commission signs the dismissal.

Ms. Neff responded any of the intervenors could appeal. A new certification has been issued and one of the intervenors has appealed the issuance of that certification.

Ted Heisel, Missouri Coalition for the Environment, reported the coalition was not a party to the settlement and does not feel it solves any of the underlying issues that were part of the original appeal. The coalition had suggested that the appeal move forward but the hearing officer felt the first appeal needed to be dismissed after which another appeal could be filed. The Coalition for the Environment and Environmental Defense now have a pending appeal after filing a new appeal.

Commissioner Perry asked which parties this appeal is against.

Mr. Heisel responded this is an appeal of the Department of Natural Resources' issuance of the certification.

Commissioner Perry asked if there is an issue in this regarding water quality standards.

Mr. Heisel responded there is a separate issue about whether this action today will be appealable to a court of law. This commission is not signing off on the settlement so there would be no reason for the Coalition to take this to court. As long as the current pending appeal goes forward, there is no issue with this dismissal other than it would have been more efficient to continue the original appeal.

Commissioner Perry asked if the COE is no longer a party to this new appeal.

Mr. Heisel responded the COE will most likely be a party but are not technically so at this time.

Ms. Neff stated when you do an appeal by a third party, it's against the action taken by the agency. When an interested party is generally the person who holds the permit or certification, traditionally they are a party to the action although the primary parties would be the agency and the appellant. This is an amended certification that was reissued which gave the coalition appeal rights. While it's a new case, it is the same parties.

Bill Bryan, Assistant Attorney General, reported he represented the department in the original and now the present appeal. He stated that under Missouri law, all the discovery that has been done and depositions that have been taken can be used in this proceeding.

Commissioner Perry asked if there is a stay on the COE proceeding with the project.

Mr. Bryan responded that no one has requested a stay.

Ms. Neff recommended the commission accept the recommended order of the hearing officer.

Commissioner Perry moved to **accept the hearing officer's recommendation regarding Appeal 380** St. John's Bayou and New Madrid Floodway Project; seconded by Commissioner Hauser and unanimously passed.

Dismissal of Appeal 371 Cross Country Trail Ride, LLC

A Settlement Agreement was reached in this matter where Cross Country, LLC agrees without admitting any claim of law or fact made by MDNR to dismiss with prejudice the

administrative appeal. Ms. Neff recommended the commission grant the voluntary dismissal with prejudice as set out in the settlement agreement provided to the commission.

Commissioner Greene moved to **dismiss with prejudice Appeal 371** Cross Country Trail Ride, LLC; seconded by Commissioner Perry and unanimously passed.

INFORMATIONAL SESSION

Watershed Report

Bill Kurtz of the University of Missouri, Columbia presented information on the Long Branch Watershed project in Macon and Adair Counties.

Discussion of Missouri River Fight and Its Water Quality Implications

Bill Bryan provided information on the Missouri River situation and how it ties into water quality issues.

Adjournment

There being no further business to come before the commission, Chairman Herrmann adjourned the meeting at approximately 4:05 p.m.

Respectfully submitted,

Jim Hull
Director of Staff